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IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1995

RAY DELL DEVOLL
Petitioner
VS.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES THE COURT OF APPEAL FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the TRIAL COURT Committed Reversible Error by utilizing a Jury Instructions which as a whole misled the Jury about the elements of the offense for a violation of 18 U.S.C. § 1014?

Whether the Fifth Circuit Court of Appeals Erred in utilizing a "Plan Error" Standard of Review; when failure to object to Jury Instructions at Trial for the purpose of preserving error was induced, aided an perpetuated by prior ambiguity and ambivalence of 5th Circuit precedents concerning the elements for violation of 18 U.S.C. § 1014?

LIST OF PARTIES

Petitioner RAY DALE DEVOLL was the defendant/ appellant in the proceedings below. Respondent UNITED STATES OF AMERICA was the Plaintiff/appellee in the proceedings below

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW i

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY UTILIZING A JURY INSTRUCTIONS WHICH AS A WHOLE MISLED THE JURY ABOUT THE ELEMENTS OF THE OFFENSE FOR A VIOLATION OF 18 U.S.C. § 1014?

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN UTILIZING A "PLAIN ERROR" STANDARD OF REVIEW; WHEN FAILURE TO OBJECT TO JURY INSTRUCTIONS AT TRIAL FOR THE PURPOSE OF PRESERVING ERROR WAS INDUCED, AIDED AND PERPETUATED BY PRIOR AMBIGUITY AND AMBIVALENCE OF 5TH CIRCUIT PRECEDENTS CONCERNING THE ELEMENTS FOR A VIOLATION OF 18 U.S.C. § 1014?

CERTIFICATE OF INTERESTED PERSONS ii

TABLES OF CONTENTS iii

TABLES OF AUTHORITIES iv

PETITION FOR WRIT 1-2

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3-7

REASON FOR GRANTING THE WRIT 8-9

ARGUMENT 10-13

CONCLUSION 14-15

INDEX TO APPENDICES

Appendix A1	Opinion of the Court of Appeals reported (Filed November 28, 1994)
Appendix B1	Supersedes Indictment filed March 28, 1991 and February 27, 1992
Appendix C1	Excerpt Jury Charge
Appendix D1	18 U.S.C. § 1014 18 U.S.C. § 2

TABLES OF AUTHORITIES

Cases **Page**

United States v. Bowman,
783 F.2d 1192, 1197 (5th Cir. 1986 12-13

United States v. Devoll,
39 F.3d 575, 580 (5th Cir. 1994) 10-13

United States v. Pace,
10 F.3d 1106, 1120.21 (5th Cir. 1993) 10

United States v. Simmons,
503 F.2d 831 (5th Cir. 1974) 12, 13

United States v. Thompson,
811 F.2d 841, 844 12

STATUTES

18 U.S.C. § 1041 ..... 10, 11, 13, 14

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1995

RAY DELL DEVOLL

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES THE COURT OF APPEAL FOR THE FIFTH CIRCUIT

Petitioner, **RAY DELL DEVOLL**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit refusal to overturn a multi-verdict of guilty for violation of Title 18

U.S.C. 1014 and 2 (Providing Fraud Statements to FDIC Banks). Said conviction were obtained utilizing a Jury Instruction which as a whole misled the Jury as to the elements of the alleged Title 18 U.S.C. § 1014 violations; in Counts 3, 5, 7, 10 and 12 of the Indictment. In addition under Counts 3 and 12, the Petitioner was found guilty of acts which are outside of the scope of acts covered and deemed to be criminal to sustain a conviction under Title 18 U.S.C. § 1014.

OPINIONS BELOW

The reported opinion of the Court of Appeals for the Fifth Circuit appears in Appendix A to this Petition and is cited as United States v. Devoll, F.3d 575 (5th Cir. 1994).

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on November 28, 1994. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Making false statement to FDIC Bank U.S.C. § 1014 set forth in Appendix D1.
2. Aiding and abetting bank fraud 18 U.S.C. § 2 set forth in Appendix D2.

STATEMENT OF THE CASE

The United States District Court, Northern District of Texas Dallas Division had Jurisdiction pursuant to Title 18, United States Code § 3231.

A. Proceeding Below:

In the case at hand, the Petitioner was convicted in fifteen (15) counts of a seventeen (17) count indictment containing

allegations of multiple violations of the following statutes:

1. 18 USC § 1344 & 2	Bank Fraud	(4) Counts
2. 18 USC § 1014 & 2	False Statement	(5) Counts to FDIC Bank
3. 18 USC § 41 & 2	Mail Fraud Affecting a Financial Institution	(2) Counts
4. 12 USC § 1818 (j) 18 USC § 2	Violation of Federal Reserve System Orders of Prohibition	(3) Counts
5. 18 USC § 37	Conspiracy	(1) Count

On August 9, 1993, the Trial Court sentenced Ray Dell Devoll to a term of imprisonment of 78 months and three years of Supervised Released. Ray Dell Devoll filed a timely Notice of Appeal and appealed his conviction to the United States Court of Appeals for the Fifth Circuit. By published opinion dated November 28, 1994, the Fifth Circuit affirmed Devoll's convictions. United States of America v. Ray Dell Devoll, 39 F.3d 575 (5th Cir. Nov. 28, 1994).

B. Statement of Relevant Facts

The present Writ is sought in reference to the five (5) 18 U.S.C. § 1014 and 2 violations for making false statements to a FDIC Bank. Factually in each count relating to this violation which are counts 3, 5, 7, 10 and 12 respectively either singularly or in combination, the facts will reflect that at some point in time, the Appellant represented to the FDIC institutions involved that:

1. He had a group of investors who sought to purchase the institution and or;

2. That he sought to purchase a vehicle or vehicles by way of drafts drawn on the various institutions and that he would make funds available to cover said drafts.

In Count 3 of the Indictment (See Appendix B), Appellant made various representations to Interstate Savings and Loan Association, Perryton, Texas (herein "Perryton") concerning investors he had to purchase the institution. Additionally, the record reflects as outlined in the indictment that various transactions took place concerning the purchase of the stocks of "Perryton" by utilizing funds from the Federal Home Loan Bank, Irving, Texas. The transaction as alleged would have produced the purchase of the Institution with its own funds. As to this Count, the Appellant was found Guilty by the Jury utilizing a Jury Instructions which outlined the elements of the offense as follows:

First: That named Institution was federally insured

Second: That the defendant made, or cause a false statement to be made to [Named Institution].

Third: That the defendant did so for the purpose of influencing some action to be taken by [Named Institution]. (See Appendix C).

Under Count 5 of the indictment an additional 18 U.S.C. Section 1014 and 2 violation was presented against the Petitioner concerning Interstate Savings and Loan Association Perryton, Texas (herein "Perryton"). As to this Count, the evidence at Trial reflected that the Petitioner had made representations to representatives of "Perryton" that he would open two (2) accounts to pay for two (2) bank drafts which he had caused to be sent to "Perryton" for the purchase of two Buick automobiles he had taken possession of; however, no funds were ever sent. The Appellant was also found guilty of a violation of 18 U.S.C. 1014 and 2 utilizing the same Jury Instructions as outlined previously for Count 3 herein (see

Appendix C).

In Count 7 another 18 U.S.C. § 1014 and 2 violation involving Interstate Savings and Loan Association, Perryton, Texas (herein "Perryton") the indictment alleges that the Petitioner made representation to "Perryton" that he would be sending funds to pay for a draft forwarded to "Perryton" for the purchase of a Lexus LS 400 automobile. The testimony at trial reflected that said representation was made and that no funds were provided by the Petitioner to open an account or to pay for the draft on the automobile. As was the case in the previous 18 U.S.C. § 1014 and 2 violations alleged in the indictment, the Appellant was found guilty utilizing the same Jury Instructions from the previous counts (See Appendix C).

Under Count 10 of the indictment the Appellant was again charged with a violation of 18 U.S.C. § 1014 and 2. The indictment alleged that the Appellant made representations to Trinity National Bank, Benbrook, Texas (herein "Trinity") that he had a group of investors who wanted to purchase the majority of the bank's stocks and inject capital into the bank. The Appellant also made statements to the bank that funds would be sent to "Trinity" to pay for bank drafts he caused to be sent to "Trinity" for the purchase of a Buick Regal and a Buick Park Avenue automobile. Testimony at trial established that the alleged representations were made by the Petitioner as alleged. In keeping with the allegations and testimony, the Petitioner was found guilty by the Jury utilizing the Jury Instructions previous discussed in the other 18 U.S.C. § 1014 and 2 Counts. (See Appendix C).

In Count 12, the final 18 U.S.C. § 1014 and 2 violation alleged in the Indictment allegations were raised that the Petitioner made representation to the First Continental Bank, Grand Prairie, Texas (herein "First") that he had a group of investors who intended to purchase a majority of "First's" stock or purchase the bank's stock loan from NCNB Bank, Dallas, Texas. The Indictment further alleged that the representations made by the Petitioner to "First" were made when the Petitioner knew he did not have a viable group of investors, nor did he intend to finalize the transaction. Testimony at trial revealed that various representations were made to "First" and as to same, the Jury found the Petitioner Guilty of a violation of 18 U.S.C. § 1014 and 2 as alleged utilizing the same Jury Instructions previously mentioned in the other 18 U.S.C. § 1014 and 2 Counts discussed herein (See Appendix C).

REASON FOR GRANTING WRIT

I

This case presents an important issue concerning the use of the "Plain Error" Standard of Review in cases where error is not preserved by objection at Trial. On this point, is the "Plain Error" Standard appropriate and applicable when the failure to object and preserve error is directly induced, created and perpetuated by admitted "ambiguous and ambivalent" in 5th Circuit precedents concerning the elements for a Title 18 U. S. C. § 1041 violation.

II

This Court should grant a writ of certiorari to review the opinion of the Fifth Circuit because the Fifth Circuit's position to utilize the higher "Plain Error" Standard in a matter wherein prior Fifth Circuit precedents contributed to the absence of an objection to the Jury Instructions creates an obvious departure from the accepted and usual course of judicial proceeding by the 5th Circuit while also sanctioning a departure by the lower Court. Additionally, the departure violates the Petitioner's Constitution Due Process Rights because the Jury Instructions; as a whole misled the Jury as to the elements for a violation of 18 U.S.C. § 1014.

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY UTILIZING A JURY INSTRUCTION AS A HOLE MISLED THE JURY AS TO THE ELEMENTS FOR A VIOLATION OF 18 U.8.C. § 1014.

The Standard of Review applied to Jury Instructions in the 5th Circuit as outlined in United States v. Pace, 10 F.3d 1106, 1120-21 (5th Cir. 1993) states that a "review applied to jury instructions asks whether "the Court's charge as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them. Reversible error exists when "the jury charge as a whole misled the jury as to the elements of the offense." In the case at hand involving multiple violations of Title 18 U.S.C. 1014, the 5th Circuit applied the Pace test and held that the Jury Instructions utilized in the Trial of Petitioner Devoll was erroneous when compared to the provisions of Title 18 U.S.C. § 1014. United States of America v. Ray Dell Devoll, 39 F.3d 575, 580 (5th Cir. 1994).

As to the above finding, if an objection had been raised and error preserved by Petitioner's Trial Counselor, the five (5) Title 18 § 1014 Violations should have been reversed. However, an objection to the erroneous Jury Instructions was not made for the reasons outlined in item II below.

II

THE FIFTH CIRCUIT COURT OF APPEALS ERRED

BY UTILIZING A "PLAIN ERROR" STANDARD OF REVIEW; WHEN FAILURE TO OBJECT TO JURY INSTRUCTIONS AT TRIAL FOR THE PURPOSE OF PRESERVING ERROR WAS INDUCED, AIDED AND PERPETRATED BY PRIOR AMBIGUITY AND AMBIVALENCES OF 5TH CIRCUIT PRESIDENTS CONCERNING THE ELEMENT FOR A VIOLATION OF TITLE 18 U. S . C. § 1014 .

Incorporating by reference all points raised in the previous argument the Petitioner now addresses the adverse impact to the Petitioner caused as a result of the 5th Circuit election to utilized the "Plain Error" Standard of Review because the Jury Instruction were not objected to at Trial and the error was not preserved. The Jury Instructions utilized at Trial as to the violation of Title 18 U.S.C. § 1014 stated that the elements of the offense were:

First: That [Named Institutions] were federally insured;

Second: That the defendant made, or cause a false statements to be made to [Named Institutions];

Third: That the defendant did so for the purpose of influencing some action to be taken by [Named Institution].

As to Counts 3, 5, 7, 10 and 12 respectively this Jury Instruction was provided to the Jury for purposes of assessing petitioner Devoll violation of Title 18 U.S.C. § 1014. In Devoll, the 5th Circuit held that the Instruction was erroneous Devoll at 580, in particular the erroneous aspect of the Charge is the language in the Third Element above which states unequivocally utilizing the Second

Element that an individual who makes a false statement to an institution "for the purpose of influencing some action to be taken by "[Named Institution]" is guilty of violating Title 18 U.S.C. § 1014.

The language in the Instruction indeed was erroneous as compared to previous holdings by the 5th Circuit which outlined the elements for violating Title 18 U.S.C. § 1014 such as the holding in:

> United States v. Bowman, 783 F.2d 1192, 1197 (5th Circuit 1986) which states in summary that the false statement influence in any way the action of [a described financial institution].. upon any application advances... commitment or land; and
>
> United States v. Simmons, 503 F.2d 831 (5th Cir. 1974) which states that in order to meet its burden of proof in any prosecution pursuant to Title 18 U.S.C. § 1014 the government must show (1) that a statement has been supplied by the defendant to a specified lending institution which is capable of influencing the institution's decision to loan funds."

The erroneous language, however, becomes correct language when viewed in light of the 5th Circuit's holding in United States v. Thompson, 811 F.2d 841, 844 were the following language is providing concerning a violation of Title 18 U.S.C. § 1014.

"To summarize, the government must prove beyond a reasonable doubt that:

(1) the defendant made a false statement to financial institution;

(2) the defendant made the false statement knowingly;

(3) he did so for the purpose of influencing the financial

institution's action; and

(4) the statement was false as to a material fact."

In Devoll at 580 the Fifth Circuit admits it error in producing ambivalence and ambiguity into the area based on prior precedents. The Fifth Circuit, however, utilizes the short coming of its prior decision to under girdle its position that in the case at hand the error in the Jury Instruction was not a "Plain Error" Devoll at 580. Further, the 5th Circuit states that even if "Plain Error" was present the evidence was of such nature that the error was not prejudicial and did not affect the outcome of the proceeding. Devoll at 581. This position is erroneous when the correct elements of a Title 18 U.S.C. § 1014 violation is compared to the counts in the Indictment in particular Count 12 which is set out below and states in summary that the Petitioner made false statements about having investors who wanted to buy the First Continental Bank, but makes no reference to lending, advances or other bank activity as required by Bowman and Simmons.

COUNT 12

On or about December 1989 through about June 1990 in the Forth Worth Division of the Northern District of Texas RAY DELL DEVOLL, defendant herein, did knowingly make and cause to made a false statement to the first Continental Bank, grand Prairie, Texas, a financial institution the deposits of which were insured by the Federal Deposit Insurance

> Corporation, for the purpose of influencing the actions of First Continental Bank, said statement being that RAY DELL DEVOLL and a group of investors intended to purchase the majority of First Continental Bank's stock or purchase the bank's stock loan from NCNB Bank, Dallas, Texas, pursuant to negotiations, when in truth and fact, RAY DELL DEVOLL had no viable group of investors, nor did he intend to finalize this agreement and provide funds to purchase the bank's stock, nor did he have funds available to purchase First Continental Bank's stock loan from NCNB Bank.
>
> In violation of Title 18, United States Code, Sections 1014 and 2.

Additionally, Count 3 also falls short of a prime facie case of a violation of Title 18 U.S.C. 1014 when compared to the proper Jury Instructions.

CONCLUSION

It is apparent that Petitioner Devoll is a victim of error in the Jury Instruction attributable to the Trial Court and to the 5th Circuit as it has admitted in Devoll at 580. Based on the course of action taken by the 5th Circuit and its reasoning as to the absence of error, the Petitioner believes that this Writ of Certiorari should be granted because the 5th Circuit had departed from the accepted and usual course of judicial proceeding and by its ruling in Petitioner Devoll case sanctioned such a departure by the Trial Court, as to call for an exercise of this Court's power of supervision. Certainly in the case

> Corporation, for the purpose of influencing the actions of First Continental Bank, said statement being that RAY DELL DEVOLL and a group of investors intended to purchase the majority of First Continental Bank's stock or purchase the bank's stock loan from NCNB Bank, Dallas, Texas, pursuant to negotiations, when in truth and fact, RAY DELL DEVOLL had no viable group of investors, nor did he intend to finalize this agreement and provide funds to purchase the bank's stock, nor did he have funds available to purchase First Continental Bank's stock loan from NCNB Bank.
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at hand, petitioner's Trial Lawyer who had no reason to go against the precedents of the 5th Circuit concerning the elements for a violation of Title 18 U.S.C. § 1014 nor does the two wrongs as applied by the 5th Circuit (i.e. wrong charge based on wrong law) make a Right. Additionally, the Petitioner's Constitutional Due Process Right were violated by the failure of having a proper Jury Instruction.

Respectfully submitted,

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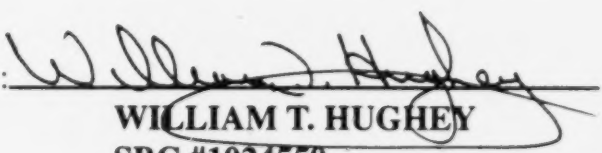
By: 

WILLIAM T. HUGHEY
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APPENDIX A

PUBLISHED OPINION OF THE COURT OF APPEALS REPORTED

U.S. V. DEVOLL
39 F.3D 575
(5TH)

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee

v.

Ray Dell DEVOLL, Defendant-Appellant.

No. 93–1676

United States Court of Appeals,
Fifth Circuit

Nov. 28, 1994

Before POLITZ, Chief Judge, GOLDBERG and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:

Ray Dell Devoll appeals his convictions by a jury of 16 counts of a 17-count indictment, including conspiracy, bank fraud, false statements to a federally insured financial institution, mail fraud, and violation of Federal Reserve System Orders of Prohibition. Devoll contends that the counts charging violations of 18 U.S.C. § 1014 were defective, that the jury instructions misled the jury about the elements of that offense, and that the evidence is insufficient to support the convictions for violations of 12 U.S.C.§ 2. We find no reversible error and affirm.

Background

The evidence reveals a modus operendi wherein Devoll would approach a financial Institution, pose as the representative of a group of investors interested in purchasing the institution, and

enter into negotiation for same. Devoll sought various benefits from his charade including the attempt to purchase Interstate Savings and Loan Association of Perryton, Texas with its own a sets. Around May 1990 Devoll approach the management of Interstate, entered into negotiations on behalf of investors, and introduced one of his coconspirators as the CEO he planned to install after the purchase of the institution. The new CEO was permitted full access to the organization's records; in the course of this review he gathered information crucial to the conspirators' scheme of transferring Interstate's funds to a phony correspondent account which was in turn to be used to purchase the Interstate stock.

During the course of the negotiations Devoll also attempted to purchase automobiles with drafts drawn on Interstate. Although Devoll had no Interstate account and had been told that he had to open accounts and deposit money before Interstate could pay the drafts, he nevertheless received immediate possession of three cars through drafts drawn on Interstate.

In October 1990 Devoll approached the Trinity National Bank of Bellbrook, Texas representing a purported partnership interested in purchasing a controlling interest providing the bank with a much needed injection. During the course of the negotiations Devoll sought to purchase two automobiles and instructed the automobile dealership to draft on Trinity. When Devoll asked Trinity to approve the draft, an employee of the bank informed Devoll that he would have to execute a loan application. Devoll's promise that he would take care of the matter later was accepted, however, based on the belief that Devoll was about to become the owner of the

bank. The draft was honored; Devoll received possession of the vehicles.

At about the same time, Devoll entered into a series of negotiations with First Continental Bank of Grand Prairie, Texas, claiming that he represented a group of investors who were interested in purchasing the bank. The president of First Continental testified that the bank received three totally unauthorized drafts for three cars. Devoll received possession of at least one automobile in this manner.

Devoll was indicted in April 1992 on 17 counts charging conspiracy in violation of 18 U.S.C. 6 371; four counts of bank fraud in violation of 18 U.S.C. § 5 1344, 2; five counts of false statements to FDIC banks in violation of 18 U.S.C. §S 1014, 2; two counts of mail fraud in violation of 18 U.S.C. §§ 1341, 2; and two counts of illegal use of social security numbers. A jury found Devoll guilty of all but the social security counts and he was sentenced to 78 months imprisonment and three years of supervised release.

1. 18 U.S.C. 1014 provides, in pertinent part

> Whoever knowingly makes, any false statement or report .. for the purpose of influencing In any way the action of ... any bank the deposits of which are insured by the Federal Deposit Insurance Corporation ... upon any application, advance, discount, purchase, purchase agreement repurchase agreement, commitment or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefore, shall be fined no more than $1,000,000 or imprisoned not more than 30 years or both.

The indictment as to these counts charged that the defendant did knowingly

Devoll appeals, challenging the indictment and jury instructions relative to the charges of bank fraud under 18 U.S.C. 5 1014, and the jury's finding that he violated Federal Reserve System Orders of Prohibition.

ANALYSIS

[1] Devoll challenges the indictment on

counts 3, 6, 7,10, and 12, claiming a failure to site an offense under 18 U.S.C. § I0l4.[1] This issue may be raised for the first time on appeal even though it was not raised at trial.[2]

[2, 3] The essence of an indictment is to inform a defendant of the charges. To survive a challenge, an indictment must fairly inform a defendant of the charge and set the predicate for invocation of the double jeopardy clause in a subsequent proceeding, if necessary.

[4] The elements comprising a violation of 18 U.S.C. 5 1014 are that the defendant made a false statement or report for the purpose of influencing in any way the action of a financial institution "upon any application, advance, ... commitment, or loan.[5] Devoll maintains

make and cause to be made a false statement of material fact to financial institution ... for the purpose of influencing the actions of [said institution]."

2. United States v. Varkonyi, 645 F.2d 453 (5th Cir.1981); Fed.R.Crim.P. 12(b)(2) & (f).

3. United States v. Gordon, 780 F2nd. 1165 (5th Cir.1986).

4. United States v. Stanley, 765 F.2d 1224 (5th Cir.1985); United States v. Webb, 747 F.2d 278 (5th Gir.1984), cert. denied, 469 U.S. 1226, 105 S.Ct. 1222, 84 L.Ed.2d 362 (1985).

5. Williams v. United States, 458 U.S. 279, 284, 102 S.Ct. 3088, 3091, 73 L.Ed.2d 767 (1982) (superseded by statute placing check kiting within the

that his indictment failed to site an offense under section 1014 because it did not charge the statutory requirement that he acted for the purpose of influencing a financial institution's lending activities. The government argues that the indictment sufficiently informed Devoll about the elements of a section 1014 violation, resting this argument in part on its contention that section 1014 does not require proof that a false statement was made for the purpose of influencing a financial institution in connection with its lending activities. We decline the government's invitation to so interpret the statute.

[5] We hold today that section 1014 relates only to lending activities by financial institutions. We review the challenge to the sufficiency of the indictment in light of that holding and conclude that the indictment passes muster. It cannot be gainsaid that the indictment did not specifically charge Devoll with fraudulent acts which were intended to influence the named financial institutions in their lending activities. Obviously the indictment could have been drawn more artfully and could have included charges that Devoll's conduct was intended to influence the institutions in their lending activities. Such

scope of federal bank fraud). See also, United States v. Hord, 7 F.3d 276, 283 (the Cir. 1993), cert. denied —U.S.—, 114 S.Ct. 1551, 1993), 128 L.Ed.2d 200 (1994) (quoting United States v. Bowman, 783 F.2d 1192 (5th Cir. 1986)); United States v. Simmons, 503 f.2d 831 (5th Cir. 1974).

6. Gordon; Varkonyi

7. Id. t 455-56 (internal citations omitted).

8. The district judge instructed the jury about the elements of 18 U. S.C. § 1014 as follows:

First: that [designated bank] was federally insured:

Second: That the defendant made or caused a false statement to be made

an articulation would have been preferable but it is not constitutionally required.

[6, 7] Each challenged count specifically refers to section 1014 which details title elements required for its violation. In the setting of this case, that reference, coupled with the language of the indictment, satisfies minimal constitutional requirements.[6] As we have noted:

Recognizing that an indictment must allege each and every element of an offense to pass constitutional muster, the law does not compel a ritual of words. The validity of an Indictment is governed by practical, not technical considerations. Accordingly, the appropriate test in this instance is not whether the indictment might have been drafted with more clarity, but whether it conforms to minimal constitutional standards.[7]

[8] Devoll next challenges the adequacy of the jury instructions, specifically, that the court failed to instruct the jury that to return a verdict of guilty it had to find that the false representations

at [designated bank]; and

Third: That the defendant did so for the purpose of influencing some action to be taken by [designated bank].

9. United States v. Pace, 10 F.3d 1106, 1120-21 (5th Cir. 1993), cert. denied — U.S. —, 114 S.Ct. 2180, 128 L.Ed.2d 899 (1994) (quoting United States v. Stacey, 896 F.2d 75, 77 (5th Cir. 1990)).

10. Id. at 1121 (quoting United States v. Kington 875 F.2d 1091, 1098 (5th Cir. 1993),

11. United States v. Gammage, 790 F.2d 431 (5th Cir. 1 986).

12. United states v. Calverley, 37 F.3d 160, 162 5th Cir. 1994) (en banc)

were made to influence the institutions' lending activities.[8]

[9] The standard of review applied to jury instructions asks whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." Reversible error exists when "the jury charge, as a whole, misled the jury as to the elements of the offense."[10]

[10,11] The record reflects no timely objection to the jury charge and our review, therefore, is limited to a consideration of plain error.[11] We may reverse for plain error only if we find that the error is plain and that it "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[12]

[12,13] Our initial inquiry is whether there actually is error and, if found, whether it can be considered plain. As our *en banc* court has recently announced, an error is plain when it is obvious, clear, or readily apparent,[13] or "so conspicuous that 'the trial judge and prosecutor were derelict in countenancing [it], even absent the defendant's timely, assistance in detecting [it].14

[14] In response to the challenge the government again

(quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)).

13. *Id.* at 163.

14. Id. (quoting United States v. Frady. 456 U.S 152, 163, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (I982)).

15. Act of June 25, 1948, ch. 645, § 1, 62 Sta. 752 (codified as amended in scattered sections of 18 U.S.C.). See United States v. Payne, 602 F.2d 1215 (5th Cir.1979), cert. denied, 445 U.S. 903, 100 S.Ct. 1079, 63 L.Ed.2d

contends that section 1014 does not require proof that a false statement was for the purpose of influencing a financial institution in connection with its lending activities. The government argues that we have adopted a broad formulation of section 1014 requiring only proof that a defendant's false statements were for the purpose of influencing an institution's actions in any way.

We reject that interpretation and conclude as previously noted, that section 1014 applies only to actions involving lending transactions. We do so for several reasons. First and foremost, the statutory language sufficiently specifies that the false representation or fraud must be made for a purpose connected with the various lending activities or practices of the financial institution. The legislative history of section 1014 provides further support for this view. With the codification of Title 18 in 1948, 13 statutes that criminalized misrepresentation in loan requests to various credit dispensing agencies of the United States were collated in section 1014.[15] As one court thereafter concluded, "the main purpose of the statute and its predecessors has always been to protect lending

319 (1980); United States v Pavlick, 507 F.Supp. 359 (M.D.Pa.1980).

According to the revisor' note, the enumeration of "application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan" did not appear in the predecessor sections, but represents a composite of terms and transaction mentioned therein.

16. Pavlick 507 F.Supp. at 363.

17 Id. (quoting 1970 U.S.C.C.A.N. (91 Stat.)) 4166, 4187 (Report of House Banking and Currency Committee recommending that state and federally chartered credit unions be included under section 1014)).

18. *Id.* (quoting 1970 U.S.C.C.A.N. (91 Stat.) 5582, 5617 (Report of House

institutions whose activities are important to federal policy. 17 Various committee reports that were produced when Congress considered amendments to the statute also reveal views of the statute as properly concerned with "false statements in loan and credit applications,"[17] "false statements in connection with loans or other similar transactions,"[18] or "fraud in credit transactions." " With this background we are not persuaded that the statute imposes liability whenever a defendant's false statement was intended to interfere with *any activity* of a financial institution; such a broad interpretation of section 1014 presumably would encompass fraud or false representations having nothing to do with financial transactions, such as, fraud in an employment contract or, for example, in a contract to provide goods or services for custodial care, premises repair, or renovation.

In light of this ruling, it is manifest that the jury instruction was lacking; indeed, compared with today's holding it necessarily must be considered erroneous. But that is not the essential issue. What we must determine is whether the charge as given constituted

Banking Currency Commitee on Housing and Urban Development Act of 1970)).

19. *Id.* at 364.

20. Hord (quoting *Bowman*); *Simmons*

21. *See United Slates v. McDo* w, 27 F.3d 132 (5th Cir.1994); *United States v. Williams*, 12 F.3d 452 (5th Cir.1994); *United States v Trice*, 823 F.2d 80 (5th Cir.1987); *United Slates v Thompson*, 811 F.2d 841 (5th Cir.1987); *United States v. Davis*, 752 F.2d 963 (5th Cir. 1985).

22. *Calverley*, 37 F.3d t 163 (internal citations omitted)

plain error as recently defined in *Calvery*. We perforce conclude that it was not plain error.

We have held that, section 1014 proscribes fraudulent conduct which impacts lending activity.[20] In other cases we appear to have viewed the statutory requirement more broadly, referring to fraud which intended to influence "any activity" of the institutions.[21] The latter cases, however, all involved attempts to interfere with conventional loan transactions. In light of this apparent ambivalence in our precedents, at least introducing a measure of ambiguity in this area, it cannot be said that the error was plain. In view of our earlier imprecision, we cannot hold that the trial court's now-identified error was "obvious, clear, or readily apparent . . . [or] so conspicuous that the trial judge and prosecutor were derelict in countenancing [it], even absent the defendant's timely assistance."[22]

[15] Even if we had concluded that the error was plain Devoll would have secured no sources for it would have then been his burden to demonstrate that the error affected his substantial

23. *Id.* at 164 (quoting United States v. Olano, — U.S. —, —, 113 S.Ct. 1770, 1778, 123 L.E.d.2d 508 (1993)).

24. 12 U S C § 1818(j) penalizes individuals who participate in the affairs of an FDIC insured financial institution while subject to an order prohibiting such participation. According to the case to the jury, to prove Devoll's guilt under this statute, the government was required to prove beyond a reasonable doubt:

First: That the defendant knowingly participated in the conduct of the affairs of any insured financial institution or engaged in any activity specifically prohibited by an order;

rights. "[I]n most cases the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding."[23] In the present case, Devoll could not have met this burden considering the ample evidence that he intended to and did Influence the named institutions in the demonstration of their lending activities. He did that in spades.

[16] Devoll finally contends that the evidence was insufficient to support this conviction on counts 13,14, and 16, charging violations of 12 U.S.C. f 1818(j) § and 18 U.S.C. § 2.[25] Specifically, Devoll argues that the government did not produce any testimony to prove the third element of section 1818(j), that he did not receive the written approval of an appropriate federal; financial Institution's regulatory agency prior to participating in the insured financial institution's affairs.

[17] Devoll moved for a judgment of acquittal at the close of the government's case-in-chief, but did not renew that objection at conclusion of the case. We may consider only whether this conviction resulted in a manifest miscarriage of justice.

> Second: That he dependent was subject to an order which prohibits such participation; and
>
> Third: that the defendant did not receive the written approval of an appropriate federal financial institutions regulatory agency prior to participating in the conduct of the affairs of any insured financial institution.

25. 18 U.S.C. § 2 provides that:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed

"A miscarriage of justice exists if the record is devoid of evidence pointing to guilt or if the evidence on a key element of the offense is so tenuous that a conviction would be shocking."[27]

The record contains undisputed evidence that in December 1984 the Federal Reserve System's Board of Governors placed Devoll under orders to cease and desist and orders of prohibition. The certification page attached to prosecution exhibits was signed by the associate secretary of the board, and stated that "A review of the official records of the Board has found no document that would modify, suspend, or rescind any of the attached documents." Further, an employee of the Federal Reserve System testified that while the orders of prohibition were in effect Devoll could not become involved in the affairs of a federally approved financial institution and that the orders of prohibition were still in effect. Concluding that this evidence was sufficient to support a determination that Devoll did not receive written approval of the appropriate regulatory agency prior to participating in affairs of insured financial institutions, we are convinced beyond peradventure that there was no miscarriage of justice herein.

The convictions are AFFIRMED.

by him or another would be an offense against the United States, is punishable as a principal.

26. *United States v. Thomas*, 12 F.3d 1350 (5th Cir.) *cert. denied*, — U.S., 114 S. CT. 2119, 128 L. ED. 2D 676 (1994); *United States v. Vaquero*, 997 F. 2d 78 78 (5th Cir.) *cert. denied* — U.S. —, 114 S.Ct. 614, 126 L.Ed.2d 578 (1993).

27. *Vaquero*, 997 F.2d at 82.

APPENDIX B

SUPERSEDES INDICTMENT FILED MARCH 28, 1991 AND FEBRUARY 27, 1992

B-1

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

UNITED STATES OF AMERICA
V.

RAY DELL DEVOLL (1)
KENNETH DOYLE ADAMS (2)

CRIMINAL NO. 4-91-0029-Y
(Supersedes Indictments filed
March 28, 1991 and February 27, 1992)

The Grand Jury charges:

COUNT 1

Beginning from on or about August 8, 1990 through on or about August 10,1990 in the Northern District of Texas, RAY DELL DEVOLL and KENNETH DOYLE ADAMS did willfully and knowingly conspire and agree together to commit the following offenses against the United States: Bank Praud in violation of Title 18, United States Code, Section 1344, and Making A False Statement to a Financial Institution, in violation of Title 18, United States Code. Section 1014.

MANNER AND MEANS

1. It was part of the conspiracy that RAY DELL DEVOLL, defendant herein, who had previously approached H.C. Brillhart,

Jr. (hereinafter "Brillhart), the controlling stockholder of Interstate Savings and Loan Association of Perryton, Texas, (hereinafter "Interstate") and negotiated with him on behalf of himself and a purported group of investors to purchase Brillhart's stock for $1,504,000.00, which was the majority of the shares of the stock, set the sale closing date for August 10, 1990. The funds to Brillhart for this sale were...

B-3

COUNT 3

On or about July and August 1990, in the Northern District of Texas, RAY DELL DEVOLL and KENNETH DOYLE ADAMS, defendants herein, did knowingly make and cause to be made a false statement of material fact to Interstate Savings and Loan Association, Perryton, Texas, a financial institution the deposits of which were insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the actions of Interstate Savings and Loan Association, said statement being that RAY DELL DEVOLL and a group of investors would purchase the majority of the stock of Interstate Savings and Loan Association for the stated price of $1,504,000 in collected funds, and further, that RAY DELL DEVOLL and KENNETH DOYLE ADAMS stated that the funds from the Federal Home Loan Bank, Irving, Texas, were to be used to open a new correspondent account at First National Bank, Amarillo to establish a legitimate correspondent relationship, when in fact and truth RAY DELL DEVOLL had no group of investors available to purchase Interstate's stock and had no intentions of legitimately purchasing a majority of the stock, and the funds purportedly to establish a correspondent account were the monies of Interstate with which RAY DELL DEVOLL and KENNETH DOYLE ADAMS planned to use to purchase the stock of Interstate without disclosing to Interstate and its stockholders the fact that they intended to use Interstate's money to purchase the stock of that same institution.

In violation of Title 18, United States Code, Sections 1014 and 2.

...representations, and RAY DELL DEVOLL knew this call was not authorized.

8. As further part of the scheme and artifice, RAY DELL DEVOLL continued negotiations and appearances of negotiations with Interstate Savings and Loan, Perryton, Texas, and continued to represent that he would provide payment for the drafts which Intestate Savings and Loan Association continued to hold enabling RAY DELL DEVOLL to continue possessing said vehicles.

9. As further part of the scheme and artifice, after Interstate Savings and Loan Association of Perryton, Texas refused to honor said drafts, RAY DELL DEVOLL ceased negotiations and the appearance of negotiations with Interstate regarding the purchase of its stock while he continued to possess the automobiles, nor did he ever pay for the vehicles, but kept them for a period of time for his use and benefit until they were repossessed and; surrendered under pressure.

In violation of Title 18, United States Code, Sections 1344 and 2.

COUNT 5

On or about May and June 1990, in the Northern District of Texas, RAY DELL DEVOLL, defendant herein, did knowingly make and cause to be made a false statement of material fact to Interstate Savings and Loan Association, Perryton, Texas, a financial institution the deposits of which were insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the actions of said institution, said statement being that RAY DELL DEVOLL was opening two (2) accounts at Interstate Savings and Loan Association

and sending funds to said financial institution to pay for two (2) bank drafts which he had caused to be sent to Interstate Savings and Loan Association for the purchase of two Buick automobiles, of which he had taken possession, and further, after RAY DELL DEVOLL did not open any accounts at Interstate Savings and Loan Association and did not send funds into said financial institution to pay for the drafts, and after RAY DELL DEVOLL was again contacted by said financial institution to pay the drafts that it was holding, RAY DELL DEVOLL stated that he would provide funds for payment on the drafts, when in fact and truth, he was not going to pay these drafts for the automobiles and RAY DELL DEVOLL well knew that he was not going to open any accounts during this time nor send funds to pay for the two drafts on the automobiles.

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNT 6

1. The Grand Jury realleges all the allegations of Count 4 of this Indictment.

2. A. On or about May 1990 through about June 1990, in the Northern District of Texas, RAY DELL DEVOLL, defendant herein, did knowingly devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, from Sewell Buick-Hyundai, Inc., Dallas, Texas, and such other persons who could and would be induced by RAY DELL DEVOLL to facilitate obtaining property from Sewell Buick-Hyundai, Inc., well knowing at the time that the pretenses,

representations and promises would be and were false when made.

B. It was part of the scheme and artifice that the defendant:

1. Contacted Interstate Savings and Loan Association, Perryton Texas, and stated that he was sending to the bank two (2) bank drafts for the purchase of two

3. On or about May 18, 1990, RAY DELL DEVOLL, defendant herein, for the purpose of executing the aforementioned scheme and artifice, and attempting to do so, knowingly caused to be delivered by the United States Postal Service, according to directions thereon, a letter addressed to Interstate Savings and Loan Association, including the aforementioned drafts.

In violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 7

On or about July and August 1990, in the Northern District of Texas, RAY DELL DEVOLL, defendant herein, did knowingly make and cause to be made a false statement of material fact to Interstate Savings and Loan Association, Perryton, Texas, a financial institution the deposits of which were insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the actions of Interstate Savings and Loan Association, said statement being that RAY DELL DEVOLL was sending funds to said financial institution to pay for a bank draft which he had sent and caused to be sent to Interstate Savings and Loan Association, for the purchase of a Lexus LS400 automobile, and further, after RAY DELL DEVOLL did not send funds into Interstate Savings and Loan Association to pay for the draft, Interstate Savings and Loan Association contacted RAY DELL DEVOLL's telephone numbers with messages for him to pay the draft that it was holding, and RAY DELL DEVOLL did

not send any funds to pay said draft, and in truth and fact RAY DELL DEVOLL well knew that he was not going to open any accounts during this time, nor provide funds to pay for the draft on the automobile which he had possessed.

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNT 10

On or about October 1990, in the Fort Worth Division of the Northern District of Texas, RAY DELL DEVOLL, defendant herein, did knowingly make and cause to be made a false statement of material fact to Trinity National Bank, Benbrook, Texas, a financial institution the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the actions of Trinity National Bank, said statement being that RAY DELL DEVOLL and a group of investors agreed to execute a written agreement that gave them the option to purchase the majority of the bank's stock and agreed to inject capital into the bank in the form of loans, and further, RAY DELL DEVOLL, stated that he would send funds to Trinity National Bank to pay for the bank drafts which he caused to be sent to Trinity National Bank for the purchase of a Buick Regal automobile and a Buick Park Avenue automobile, when in truth and fact, RAY DELL DEVOLL had no viable group of investors with which to enter said agreement and execute the written form, nor did he ever intend to pay for the drafts sent to Trinity National Bank for the two Buick automobiles in his possession.

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNT 11

On or about December 1989 through about June 1990 in the Northern District of Texas and elsewhere, RAY DELL DEVOLL, defendant herein, did knowingly execute and attempt to execute a scheme and artifice to defraud First Continental

Bank, Grand Prairie, Texas, a financial institution the deposits of which were insured by the Federal...

Indictment - Page 23

COUNT 12

On or about December 1989 through about June 1990 in the Fort Worth Division of the Northern District of Texas, RAY DELL DEVOLL, defendant herein, did knowingly make and cause to be made a false statement to the First Continental Bank, Grand Prairie, Texas, a financial institution the deposits of which were insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the actions of First Continental Bank, said statement being that RAY DELL DEVOLL and a group of investors intended to purchase the majority of First Continental Bank's stock or purchase the bank's stock loan from NCNB Bank, Dallas, Texas, pursuant to negotiations, when in truth and fact, RAY DELL DEVOLL had no viable group of investors, nor did he intend to finalize this agreement and provide funds to purchase the bank's stock, nor did he have funds available to purchase First Continental Bank's stock loan from NCNB Bank.

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNT 13

1. A. Interstate Savings and Loan Association, Perryton, Texas, at all times material herein, was a savings association the deposits of which were insured by the Federal Deposit Insurance Corporation, and as such was an insured depository institution as that term is used in Title 12, United States Code, Sections 1813(c)(2) and 1818G)(1), and was a savings association as that term is used in Title 12, United States Code, Sections 1818G)(2).

B. On or about March 6, 1984, the Board of Governors of the Federal Reserve System issued a "Notice of Assessment of Civil Money Penalties" to First Nocona

APPENDIX C

EXCERPT JURY CHARGED

C-1

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

UNITED STATES OF AMERICA

VS

RAY DELL DEVOLL

CRIMINAL NO. 4:91-CR-029-Y

CHARGE OF THE COURT

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts – it is your sworn duty to follow all of

the rules of law as I explain them to you.

You have no right to disregard or give special attention to anyone question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to

Counts three, five, seven, ten, and twelve also charge the defendant, RAY DELL DEVOLL, with making a false statement to a financial institution in violation of Title 18, United States Code, Section 1014. The elements that the government must prove are the same as these just read to you with the exception of the financial institution named in counts 10 and 12. With respect to count 10, the elements are:

First: That Trinity National Bank was federally insured;

Second: That the defendant made, or caused a false statement to be made to Trinity National Bank; and

Third: That the defendant did so for the purpose of influencing some action to be taken by Trinity National Bank.

With respect to count twelve, the elements are:

First: The First Continental Bank was federally insured;

Second: That the defendant made, or caused a false statement to be made to First Continental Bank; and

Third: That the defendant did so for the purpose of influencing some action to be taken by First Continental Bank.

In addition, to assist you in determining whether there was an agreement or understanding to engage in bank fraud in

violation of Title 18, United States Code, Section 1344, as alleged in count one, as one of the objects of the conspiracy, and in counts two, four, nine, and eleven, you are advised that Title 18, United States Code, Section 1344, makes it a crime for anyone to execute or attempt to execute a scheme or artifice to defraud a federally insured financial institution.

APPENDIX D

18 U.S.C. § 1014

18 U.S.C. § 2

§ 1014. LOAN AND CREDIT APPLICATIONS GENERALLY; RENEWALS AND DISCOUNTS; CROP INSURANCE

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section l(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25 (a) of the Federal Act" upon any application, advance, discount purchase, purchase agreement, repurchase agreement commitment, or loan, or any change or

extention of the same, by renewal, deferment of a otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more $1,000,000 or imprisoned not more than 30 years, or both.

(As amended May 24, 1949, c. 139, § 21, 63 State 26, 1956, c. 711, Title I, § 109, 70 Stat. 667, Aug Pub.L. 85-699, Title VII, § 705, 72 Stat. 699- Aug. Pub.L. 86-168, Title I, § 104(h), 73 Stat 387, Oct Pub.L. 87-353, § 3(t), 75 Stat. 774- July 2, 1965 88-353, 5, 78 Stat. 269; Oct. 19,1970, Puh.L. 91-84 Stat. 1017; Dec. 31,1970, Pub.L. 91-609, Title I: 84 Stat. 1815; Oct. 12,1982, Pub L 97-297, § 4(b) 1318; Aug. 9, 1989, Pub.L. 101-73, Title IX, § 962(a)(7), (8)(B), 103 Stat. 500, 502- Nov. 28, l99 101-624, Title XXIII, § 2303(e), 104 Stat. 3981- 1 1990, Pub.L. 101-647, Title XXV, 5§ 2504(g), 25 2597(i), 104 Stat. 48GI, 4907, 4910.)

[1] So in original. A comma probably should appear aft Credit union Administration Board".

[2] So in original.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, § 65 Stat. 717.)